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No. 98-740

# In the Supreme Court of the United States

OCTOBER TERM, 1998

NEC CORPORATION AND
HNSX SUPERCOMPUTERS, INC., PETITIONERS

*v.*

UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals properly rejected a claim of bias by the decisionmaker in an administrative proceeding under the antidumping laws, 19 U.S.C. 1673 *et seq.*

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 151 F.3d 1361. The opinion of the Court of International Trade (Pet. App. 33a-75a) is reported at 978 F. Supp. 314.

### JURISDICTION

The judgment of the court of appeals was entered on August 7, 1998. The petition for a writ of certiorari was filed on November 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Petitioners NEC Corporation, and its wholly-owned subsidiary HNSX Supercomputers, Inc. (hereafter col-

lectively "petitioner" or "NEC"), contend that the court of appeals applied an inappropriately deferential standard in rejecting their claim that their right to due process was violated because of alleged bias of the decisionmaker in the Commerce Department's antidumping determination concerning certain supercomputers from Japan.

1. Section 1673 of Title 19 of the United States Code provides for the imposition of "antidumping duties" on foreign merchandise sold in the United States where two conditions are met. First, the Department of Commerce (Commerce) must determine that the merchandise "is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673(1). Second, the International Trade Commission (ITC) must determine that an industry in the United States is, or is threatened to be, materially injured by those less-than-fair-value sales. 19 U.S.C. 1673(2). The antidumping duty is equal to the amount by which the normal value of the merchandise, *i.e.* the price in the foreign market, exceeds the United States price. 19 U.S.C. 1673; see also Pet. App. 36a-37a.

Commerce may commence a dumping investigation on its own initiative, 19 U.S.C. 1673a(a), or on petition by an interested party, 19 U.S.C. 1673a(b). The investigation proceeds in two stages—a preliminary determination, 19 U.S.C. 1673b(b), and a final determination, 19 U.S.C. 1673d(a). The purpose of the preliminary determination is to ascertain "whether there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value." 19 U.S.C. 1673b(b); 19 C.F.R. 353.15 (1997). The purpose of the final determination is to decide whether, in fact, such merchandise is being sold or is

likely to be sold at less than fair value. 19 U.S.C. 1673d(a)(1).

Affected parties may participate actively in the process, and both preliminary and final determinations must be based on information presented to or obtained by Commerce during the course of the proceeding. 19 U.S.C. 1673d(a); 19 C.F.R. 353.20 (1997). An interested party may give oral testimony and may submit written materials; if Commerce finds the submissions insufficient it must afford the party an opportunity to supplement them. 19 U.S.C. 1677m(d)-(e). Interested parties also may submit factual information to rebut, clarify or correct the submissions of another interested party. See 19 C.F.R. 353.31 (1997). Commerce is required to hold a hearing at the request of any interested party prior to its final determination. See 19 U.S.C. 1677c; 19 C.F.R. 353.38(b) (1997).

Commerce's decisions are to be based solely on information contained in the record, 19 U.S.C. 1516a(b)(2), and Commerce is required to "verify all information relied upon in making a final determination in an investigation." 19 U.S.C. 1677m(i)(1); 19 C.F.R. 353.36(a)(i) (1997). Notices of both preliminary and final determinations—including supporting facts and conclusions—must be published in the Federal Register. 19 U.S.C. 1677f(i).

Final determinations may be appealed to the Court of International Trade, see 28 U.S.C. 1581(c); 19 U.S.C. 1516a(a)(2)(B)(i). The Court of International Trade reviews the determination for substantial evidence. 19 U.S.C. 1516a(b)(1)(B)(i). If dissatisfied, the importer may appeal that court's final decision to the Court of Appeals for the Federal Circuit, 28 U.S.C. 1295(a)(5), which applies the same standard of review. See Pet. App. 25a-28a.

2. NEC was the supplier for one of several bidders[1] on a 1995 supercomputer procurement solicitation by the University Corporation for Atmospheric Research (UCAR). UCAR is a research consortium funded in part by the National Science Foundation (NSF), a federal agency. Pet. App. 44a. Under the terms of its cooperative agreement with NSF, UCAR was required to obtain NSF approval for the supercomputer acquisition and to ensure that it was free of "noncompetitive practices." See *id.* at 48a.

a. In early March 1996, NSF instructed UCAR to obtain evidence that NEC's bid did not involve dumping, as that term is understood under the United States antidumping laws. In response, UCAR commissioned a study by Dr. Lloyd Thorndyke to analyze NEC's offer. Pet. App. 3a-4a, 44a. Dr. Thorndyke ultimately concluded that NEC's offer did not involve dumping, although he did not factor research and development costs into his analysis. *Id.* at 4a, 45a.

In early April 1996, the Department of Commerce independently undertook a preliminary analysis of NEC's offer Pet. App. 4a. See also *id.* at 37a, 45a (noting that prior to self-initiating an antidumping investigation, Commerce prepares a "predecisional" analysis of the imports in question based on information then available to it). In particular, as detailed in the opinions of the trial court and the court of appeals, *id.* at 45a-51a; see also *id.* at 4a-8a, Susan Esserman, Assistant Secretary of Commerce for Import Administration (IA), began by assembling a team of Import Administration

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[1] The bidder, Federal Computing Corporation, offered to provide UCAR with NEC supercomputers, and thus NEC was treated as the real party in interest for purposes of the antidumping determination. See Pet. App. 4a n.2.

officials to collect information and analyze the possibility that NEC's offer might involve dumping.[2] On April 24, 1996, Ms. Esserman convened an interagency meeting between Commerce and NSF officials to obtain technical information on supercomputers and hear a presentation by NSF on the UCAR procurement. *Id.* at 4a, 45a.

On May 13, 1996, Ms. Esserman (who was now Commerce's Acting General Counsel) convened another interagency meeting with Paul Joffe (the new Acting Assistant Secretary for Import Administration), various other Commerce Department officials with international trade and/or computer industry expertise, and senior officials of NSF, to discuss the results of Commerce's preliminary analysis. Pet. App. 4a, 46a. At the May 13 meeting, Ms. Esserman explained the structure and operation of the antidumping statute and presented the Department's preliminary analysis of NEC's UCAR bid. *Id.* at 72a. In response to questions from NSF about the likely outcome of the administrative proceedings, Ms. Esserman indicated that a dumping finding by Commerce and an injury determination by the International Trade Commission could be made and upheld "based on the preliminary analysis as

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[2] The Assistant Secretary for Import Administration is the Commerce Department official responsible for administering the antidumping laws, with authority to initiate and conduct investigations and to make all preliminary and final determinations in antidumping proceedings. See Department of Commerce Organization Order 10-3, at § 4.01b (March 15, 1996) (delegation of authority from the Secretary of Commerce to the Under Secretary for International Trade), and Department of Commerce Organization and Function Order 41-1, Amendment 3, at § 2 (July 17, 1996), and *id.* at § 1.01d. (redelegation to the Assistant Secretary for Import Administration); Pet. App. 41a.

understood to date" of the information then available, which did not yet include any direct submissions from NEC. *Id.* at 73a-74a; see also *id.* at 28a (quoting testimony of NSF General Counsel Larry Rudolph, who attended the meeting).

A few days later, on May 17, 1996, Stuart Eizenstat, Under Secretary for International Trade,[3] and Ms. Esserman met with officials of the National Economic Council and provided a short, factual briefing on the UCAR procurement and the Import Administration's inquiry. Pet. App. 4a-5a, 47a. Meanwhile, in a letter to UCAR dated May 17, 1996, an NSF grant officer reiterated NSF's concern about the possibility of dumping in the NEC offer, and informed UCAR that based on a "constructive analysis" of NEC's proposal the Commerce Department had reached a "preliminary conclusion" that it "does not constitute an offer at fair value." *Id.* at 5a, 48a. The letter reminded UCAR that it was required to give the issue of possible dumping "due consideration" in its negotiations on the procurement and to "obtain[] sufficient documentation" of the absence of noncompetitive practices in the proposal to be submitted for NSF's approval. *Id.* at 5a, 47a-49a.

Shortly thereafter, on May 20, 1996, Acting Assistant Secretary of Commerce Joffe sent a letter to Dr. Neal Lane, Director of NSF (the Joffe letter), advising that "[u]sing standard methodology" under the antidumping

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[3] Pursuant to the delegation of all authority for antidumping determinations to the Assistant Secretary for Import Administration, the Under Secretary may give general policy guidance to the Assistant Secretary, but the Under Secretary is not involved in the conduct of, or the determinations issued in connection with, specific investigations. See Department of Commerce Organization and Function Order 41-1, Amendment 3, at § 1.01d (July 17, 1996); Pet. App. 42a.

law, "we estimate" that NEC's bid to supply UCAR was below cost, that the dumping margin on NEC's bid "is likely to be very high," and that UCAR's acquisition of NEC supercomputers "could have a serious adverse impact on" the domestic supercomputer industry. Pet. App. 6a, 49a. The letter also stated that a formal antidumping investigation could be self-initiated by Commerce or initiated pursuant to an antidumping petition. *Id.* at 49a. On the same day, Mr. Joffe sent a second letter to Dr. Lane, enclosing a "Predecisional Memorandum" setting out Commerce's preliminary dumping analysis and the estimated range of NEC's dumping margin (between 163.38% and 280%), based on the information then available, including the Thorndyke study and NEC financial statements, but not including NEC's actual cost and pricing data. Commerce authorized NSF to forward a copy of the Predecisional Memorandum to NEC and UCAR for purposes of the procurement. *Id.* at 6a, 50a-51a.

Commerce made the Joffe letter available to the press and public, including NEC's competing bidder, Cray Research, Inc., and the letter was published in an industry periodical on May 24, 1996. Several months later, the Predecisional Memorandum was also published in the same periodical, but it is unclear who released it. Pet. App. 6a, 51a. Nonetheless, that very day, on May 20, 1996, UCAR announced that it had selected NEC's bid for final contract negotiations. *Id.* at 5a, 49a.

On June 5, 1996, Robert LaRussa, who had no prior involvement in the issues relating to the UCAR procurement, succeeded Mr. Joffe as Acting Assistant Secretary of Commerce for Import Administration. Pet. App. 7a, 51a. In that capacity, Mr. LaRussa later became the final decisionmaker in the antidumping deter-

mination that petitioner challenges in this case. *Id.* at 27a, 28a. Two days after becoming Acting Assistant Secretary for IA, Mr. LaRussa was briefed by Gary Taverman, an IA official working on the matter, concerning the predecisional analysis of NEC's offer and the general content of the Predecisional Memorandum. *Id.* at 7a, 51a-52a. Mr. LaRussa read the Joffe letter but did not read the Predecisional Memorandum itself. *Ibid.* He had no communication with Mr. Eizenstat or Ms. Esserman relating to the preparation, purpose or content of the Predecisional Memorandum, or regarding the later-instituted antidumping proceedings. Mr. Eizenstat gave Mr. LaRussa only general guidance to observe all standard applicable procedures in the pending investigation. *Ibid.*

b. At this point, Congress sought information about the UCAR procurement. On June 5, 1996, three IA officials—Mr. Joffe (now a Senior Advisor to the Assistant Secretary), Mr. Taverman, and Stephen J. Powell, the Chief Counsel for IA—met with staff members of the House of Representatives Ways and Means Committee to discuss the UCAR procurement. Mr. Taverman explained Commerce's antidumping analysis, stressing that the results were just an "estimate" taken from public information and governmental sources, and that Commerce had not made a formal dumping determination. The three officials had a similar meeting with House Science Committee staff members the next day. Pet. App. 7a, 52a.

On June 10, 1996, the same three IA officials, joined by Ms. Esserman and Mr. LaRussa, met with staff members of the House Ways and Means Committee and the Senate Finance Committee, at the request of a staff member, to discuss the UCAR procurement. Mr. Taverman made a similar presentation as before. Mr.

LaRussa did not make any presentation or ask or answer any questions at the meeting. Pet. App. 52a-53a.

On June 11, 1996, the same five officials met with Representative David E. Skaggs, at his request, to discuss the UCAR procurement. Mr. Taverman explained in general terms the predecisional dumping analysis, and again Mr. LaRussa did not make any presentation or ask or answer any questions. Pet. App. 7a-8a, 53a & n.65.

c. On June 20, 1996, UCAR informed NSF that, based on NEC's comments on the Predecisional Memorandum and other information UCAR had developed and analyzed, UCAR had concluded that NEC's offer was not at less-than-fair-value and an award to NEC would comply with its cooperative agreement with NSF. NSF forwarded UCAR's letter and cost analyses to Commerce and inquired whether Commerce intended to self-initiate a formal antidumping investigation. Pet. App. 8a, 54a.

On July 29, 1996, Cray Research, Inc., filed an antidumping petition with Commerce and the International Trade Commission against vector supercomputers from Japan. Pet. App. 8a, 54a. Commerce responded by initiating an investigation on August 19, 1996. See *Vector Supercomputers From Japan*, 61 Fed. Reg. 43,527 (1996) (initial antidumping investigation).

On August 20, 1996, the Director of NSF announced that in light of the petition and investigation "it would be inappropriate" and "inconsistent with the responsible stewardship of taxpayer monies" for NSF to approve the UCAR procurement "until the dumping issue has been resolved" by the agencies having "the statutory authority, the expertise, and the established procedures to determine whether this offer is being

made at less than fair value, and whether it would be injurious to American industry." Pet. App. 8a-9a, 55a-56a.

On September 12, 1996, the International Trade Commission notified Commerce that it had made an affirmative determination in the preliminary injury phase of the antidumping investigation. Pet. App. 9a, 56a. See also *Vector Supercomputers From Japan*, 61 Fed. Reg. 50,331 (1996) (preliminary injury determination). Accordingly, Commerce sent NEC and Fujitsu, Ltd. (another foreign bidder on the UCAR procurement) an antidumping questionnaire. Pet. App. 9a, 56a.

d. NEC then filed the present suit in the Court of International Trade on October 15, 1996, seeking to enjoin Commerce's antidumping investigation of vector supercomputers from Japan on due process grounds. NEC claimed, that by its prior actions, Commerce had revealed itself to be biased in favor of NEC's competitor Cray, and had "deprived NEC and HNSX of their right to a determination by a fair and neutral decision-maker." Pet. App. 9a-10a, 56a. NEC simultaneously wrote to Commerce stating that NEC would withhold its response to the antidumping questionnaire "until such time as a qualified independent party, who is impartial and has not prejudged the matter, is appointed as a 'special master' to conduct the investigation." *Id.* at 10a, 56a-57a. NEC has never responded to the questionnaire or provided any other data in the antidumping proceeding.

The Court of International Trade denied NEC's motion for a preliminary injunction, see Pet. App. 35a, and Commerce issued a preliminary determination assigning a dumping duty of 454% against NEC on importation of supercomputers from Japan, using the "facts otherwise available," 19 U.S.C. 1677e(a)(2)(B), in the

absence of cost and price data from NEC. See *Vector Supercomputers From Japan*, 62 Fed. Reg. 45,623, 45,625 (1997). That assessment then became final. See *id.* at 55,392.[4]

3. Following a three-day trial, the Court of International Trade rejected petitioner's due process claim. Pet. App. 33a-75a. The court recognized that NEC had at least a statutory right to due process under the antidumping laws, *id.* at 60a, but it also noted that the burden of establishing denial of due process due to alleged prejudgment by the administrative decisionmaker is "heavy" and that the same principles for assessing bias are "equally applicable" to statutory and constitutional due process claims. *Id.* at 61a. Such claims "must overcome a presumption of honesty and integrity in those serving as adjudicators," the court held. *Ibid.* (citing *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975)). It is not sufficient to show the decisionmaker exercised combined investigative and adjudicative functions, *ibid.*, or that the decisionmaker had taken a public position on a policy issue, or had prior knowledge of adjudicative facts, *id.* at 62a (citing *Hortonville Joint Sch. Dist. No. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976)). Rather, the court held, there must be a showing that "the decisionmaker ha[d] a closed mind at initiation," Pet. App. 60a, as evidenced "from the conduct and statements of the decisionmaker," *id.* at 67a, that would render the proceeding a "hollow

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[4] NEC thereafter filed a complaint in the Court of International Trade under 28 U.S.C. 1581(c) challenging the ITC's final determination that vector supercomputers from Japan threaten to cause a material injury to a domestic industry. The Court of International Trade issued its decision on December 15, 1998. See *NEC* v. *Department of Commerce*, No. 97-11-01967, 1998 WL 892093.

formality." *Id.* at 60a, 67a. The court noted that a mere preliminary opinion formed by the decisionmaker in the course of the proceeding is not disqualifying, nor can the independent opinions and recommendations of staff suffice to show that the mind of the decisionmaker "is closed." *Id.* at 65a.

Applying this standard to the evidence and testimony before it, the trial court concluded that NEC had not met its burden. Indeed, the court explained, the decisionmaker, Mr. LaRussa, had no involvement in Commerce's preliminary assessment that NEC's offer involved dumping. Pet. App. 68a-74a. Moreover, Mr. LaRussa's "decisional independence" in the antidumping proceeding was not so "constrained" by the preliminary staff analysis (or by the presentation of that preliminary analysis to NSF, Congress or the public) as to "preclude[] a fair investigation," *id.* at 68a, or to "lead to a pre-determined result," *id.* at 74a, because that analysis was always presented in qualified terms based on the evidence available, which expressly never included NEC's actual cost and price data, and NEC elected not to refute the analysis by providing its actual data and participating in the proceedings leading to the final dumping determination. *Id.* at 70a-74a.

4. The court of appeals for the Federal Circuit affirmed. Pet. App. 1a-32a.[5] The court first noted that NEC was entitled to an impartial decisionmaker in the antidumping proceeding regardless of whether the asserted right to due process is statutorily-based or is

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[5] The court of appeals concluded that NEC's due process challenge to the antidumping proceeding was not rendered moot by the conclusion of that proceeding, because the trial court could still fashion a useful remedy in the form of prospective relief from the effects of the final antidumping order. Pet. App. 16a.

founded on fundamental interests protected by the Constitution. *Id.* at 16a-20a. The court, however, rejected NEC's assertion that "a prejudgment claim must be sustained if there is even the *appearance* of unfairness," such as may arise when "objective facts reveal that the decision maker has 'in *some* measure' prejudged the issues." *Id.* at 21a (quoting from petitioner's brief on appeal). Such a standard, the court held, is not only impractical for administrative agencies "with the duty both to investigate and then judge," but also "is inconsistent with prior prejudgment cases." *Ibid.* Rather, the court of appeals concluded that this Court had established a standard applicable to agencies with combined investigative and adjudicative functions by distinguishing "between [a decisionmaker having] previous knowledge of the facts and [one having] an advance commitment about them." *Ibid.* (citing *Withrow*). Under that standard, the court of appeals explained, a party claiming prejudgment must "establish that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.* at 24a (citing *Hortonville*, 426 U.S. at 493 (internal quotation marks omitted)). The court of appeals stated that this standard can be met, "for example," by showing that the decisionmaker's mind "is 'irrevocably closed' on a disputed issue." *Ibid.* (citing *FTC* v. *Cement Inst.*, 333 U.S. 683, 701 (1948)).

Such a showing was not made in this case, the court held, because "NEC has failed to demonstrate that the decision maker, here Mr. LaRussa, was not capable of judging this particular controversy fairly on the basis of its own circumstances." Pet. App. 28a. The court noted that "[e]ach of the statements that NEC points to as evidence of prejudgment [by Commerce staff and Mr. LaRussa's predecessors] were qualified" as "construc-

tive," "preliminary," "estimated," and "based on the preliminary analysis as understood to date," and all were made expressly without benefit of NEC's direct input. *Id.* at 28a-29a. The statements to Congress—which, again, were made by officials other than Mr. LaRussa—were similarly preliminary and conditional, *id.* at 29a-30a, and were couched in "broad, qualified generalities." *Id.* at 29a. Further, there was nothing "that indicates that Commerce would not reconsider these [estimated] figures once they were presented with actual data." *Ibid.* Accordingly, the evidence failed to "establish that Mr. LaRussa's mind was 'irrevocably closed,'" or to sustain NEC's contention that the Commerce Department had "backed * * * into a corner, and dragged Mr. LaRussa there with it." *Ibid.* Thus, the court reiterated, "NEC has failed to satisfy its burden to prove that Mr. LaRussa was incapable of judging this particular controversy fairly on the basis of its own circumstances." *Id.* at 30a. Indeed, the court noted, it was NEC's own choice "to withhold whatever facts it might have favorable to its cause, and to allow Commerce to proceed to its final decision on the basis of the [otherwise] available information." *Id.* at 31a.

## ARGUMENT

1. Although petitioner asks this Court to review the standard the Federal Circuit applied in rejecting its due process claims, petitioner overlooks two antecedent jurisdictional barriers to review of that issue—justiciability/mootness, and the limited scope of the Court of International Trade's jurisdiction under 28 U.S.C. 1581(i).

Petitioner brought this action under Section 1581(i) to enjoin Commerce's antidumping proceedings against it. Although Section 1581(i) gives the Court of Inter-

national Trade jurisdiction over civil actions commenced against officers of the United States that arise out of the administration and enforcement of certain trade laws, it excepts from that grant of jurisdiction any "antidumping or countervailing duty determination" if that determination is reviewable by the Court of International Trade under another provision.

Although the Federal Circuit recognized that this case involved an antidumping determination, it held that Section 1581(i)'s exclusion did not apply because the alternative remedy under Section 1581(c)—which would require petitioner to await the allegedly preordained outcome of the proceeding before Commerce and then appeal the result—would be "manifestly inadequate." Pet. App. 14a. By the time the court of appeals heard the case, however, the Commerce proceeding that petitioner sought to enjoin and thus avoid had already been completed. *Id.* at 15a. No one disputes that petitioner's request for an injunction against the proceeding before Commerce became moot when the proceeding was completed. See *id.* at 16a (agreeing with the "unremarkable proposition that a case is rendered moot by the conclusion of an administrative proceeding where the *only* remedy sought by the plaintiff is to enjoin the proceeding.").

Nonetheless, the court of appeals refused to dismiss the case as moot because, in its view, the Court of International Trade could still afford *other* relief against Commerce, such as enjoining the *enforcement* of Commerce's orders. See Pet. App. 16a. That reasoning, however, overlooks the limited scope of the Court of International Trade's jurisdiction under Section 1581(i). As noted above, Section 1581(i) does not permit the Court of International Trade to exercise jurisdiction over suits arising from antidumping deter-

minations *if* the law provides other adequate means for review. To the extent petitioner seeks a *post*-determination remedy that addresses the *effect* of Commerce's final order, such as an injunction against its enforcement, there is another (and wholly adequate) means of obtaining review—direct appeal, under 28 U.S.C. 1581(c), of Commerce's final order to the Court of International Trade. As a result, the Court of International Trade is barred by statute from granting such relief in this Section 1581(i) lawsuit, and a claim for such relief cannot save this lawsuit from mootness. Simply put, one cannot prevent a lawsuit from being moot by seeking additional relief that the trial court, as a jurisdictional matter, could never give.

2. In any event, even apart from that jurisdictional defect, petitioner's claims lack merit and do not otherwise warrant this Court's review.

a. It is by now settled law that administrative decisionmakers are presumed "to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975) (quoting *United States* v. *Morgan*, 313 U.S. 409, 421 (1941)). This "presumption of honesty and integrity in those serving as adjudicators" controls, 421 U.S. at 47, and can be overcome in a particular case only by meeting the "difficult burden" (*ibid.*) of showing "special facts and circumstances present in the case [by which a court can determine] that the risk of unfairness is intolerably high," *id.* at 58, such as when "the adjudicator has a pecuniary interest in the outcome," or "has been the target of personal abuse or criticism from the party before him." *Id.* at 47. See also *Hortonville Joint Sch. Dist. No. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482, 491-492, 493 (1976) (no disqualifying bias

absent "the kind of personal or financial stake in the decision that might create a conflict of interest" or a showing of "personal animosity," or other facts demonstrating that the decisionmaker was not "capable of judging a particular controversy fairly on the basis of its own circumstances") (internal quotation marks omitted).

Under this presumption of regularity, due process is not offended merely by the decisionmaker's prior exposure to evidence developed or presented in the course of nonadversary investigative procedures. To the contrary, it is well established that investigative and adjudicative functions can be performed by the same administrative body, or even by the same officials, without creating an unconstitutional risk of bias. Thus, in *Withrow* v. *Larkin*, this Court held that the members of a state medical examining board who had investigated the facts and concluded that there was probable cause to believe that a physician committed certain proscribed acts were not disqualified from later adjudicating the merits and imposing discipline. 421 U.S. at 52, 57. Time and again this Court has reiterated that holding. See, *e.g.*, *Hortonville*, 426 U.S. at 493-494 (information learned by school board members in negotiating with teachers to try to prevent an illegal strike did not disqualify the board from later adjudging discipline for teachers striking in violation of state law); *FTC* v. *Cement Inst.*, 333 U.S. 683, 700-703 (1948) (ex parte investigation by Federal Trade Commission into facts surrounding cement industry pricing practices did not bar Commissioners from deciding later unfair trade practice proceeding against a specific manufacturer).

Likewise, it is by now settled law that disqualifying bias also is not shown merely because the decisionmaker has reached, or even publicly expressed, a pre-

liminary judgment on the law and the facts that he or she must revisit in a later adjudicatory proceeding involving the same parties. *Cement Inst.*, 333 U.S. at 700-703 (FTC reports to Congress and the White House and testimony of certain Commissioners before Congress, concluding that an industry-wide pricing method was illegal, did not disqualify the Commission from deciding whether a particular manufacturer using that method had violated the law). Indeed, this Court has noted that "judges frequently try the same case more than once [due to remands after appeal] and decide identical issues each time, although these issues involve questions of both law and fact," and an administrative agency "cannot possibly be under stronger constitutional compulsions in this respect than a court." *Id.* at 703 (footnote omitted); see also *Withrow*, 421 U.S. at 48-50 (same); *Pangburn* v. *Civil Aeronautics Bd.*, 311 F.2d 349, 358 (1st Cir. 1962) ("[W]e cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required.") (quoted with approval, *Withrow*, 421 U.S. at 50 n.16).

Petitioner essentially concedes these principles. See Pet. 23 ("NEC does not contend that Commerce's exposure to the facts surrounding NEC's UCAR bid in the course of [Commerce's] internal deliberations regarding the possible self-initiation of an antidumping proceeding would have warranted disqualification."); Pet. 22 (acknowledging that "a decisionmaker may permissibly announce a preliminary conclusion regarding adjudicative facts—in the context of an investigative or other proceeding conducted pursuant to procedures

established by statute or regulation—and then revisit those same factual issues in the context of a subsequent adjudication"). Petitioner, however, attempts to distinguish these cases by arguing that the claim in this case (1) arises from "highly irregular actions and pronouncements by Commerce that took place entirely *outside* the established statutory and regulatory procedures governing antidumping proceedings," Pet. 23, 25, and (2) involves an adjudicatory rather than rulemaking proceeding, Pet. 25-26. According to petitioner, the Sixth, Eighth, Tenth, and District of Columbia Circuits have held that, under those circumstances, an impermissible bias must be found if "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of [the] particular case in advance of hearing it." See Pet. 12-15 (citing *Texaco, Inc.* v. *FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965); *Cinderella Career & Finishing Sch., Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970); *American Cyanamid Co.* v. *FTC*, 363 F.2d 757 (6th Cir. 1966); *Staton* v. *Mayes*, 552 F.2d 908 (10th Cir.), cert. denied, 434 U.S. 907 (1977); *Antoniu* v. *SEC*, 877 F.2d 721 (8th Cir. 1989), cert. denied, 494 U.S. 1004 (1990)).

a. Petitioner's claim of conflict lacks merit, and is to a great degree based on a misreading of the Federal Circuit's decision. In large part, petitioner seems to argue that the court of appeals applied an "irrevocably closed mind" standard. Pet. 11, 18. That standard, petitioner argues, applies only in legislative (rulemaking) proceedings, and cannot be applied in adjudicatory proceedings such as an antidumping proceeding. Pet. 19-22.

The Federal Circuit, however, nowhere held that the test for impermissible bias is an "irrevocably closed

mind." To the contrary, the Federal Circuit expressly applied the standard this Court articulated in *Hortonville*, under which NEC would "prevail on its claim of prejudgment" if "it [could] establish that the decision maker is not capable of judging a particular controversy fairly on the merits of its own circumstances." Pet. App. 24a (quoting *Hortonville*, 426 U.S. at 493); see *id.* at 28a ("NEC has failed to demonstrate that the decision maker, here Mr. LaRussa, was not capable of judging this particular controversy fairly on the basis of its own circumstances."). Of course, the court of appeals mentioned proof of an "irrevocably closed" mind as an "example" of the sort of showing that would satisfy the standard it had articulated. Pet. App. 24a. But petitioner conflates the standard itself (incapable of judging the controversy fairly) with an example of how that standard might be met (an irrevocably closed mind) by omitting the words "for example" from its quotation of the Federal Circuit's decision. See Pet. 19 (quoting Pet. App. 24a, but omitting the words "for example").

b. In any event, petitioner's claim of "conflict" is unpersuasive. Even if we set aside (for the moment) the fact that there was no "irregular" conduct in this case, see pp. 27-28, *infra*, the *Cinderella/Texaco* line of cases upon which petitioner relies does not establish a different or more easily met standard for administrative bias claims whenever those claims are based on allegedly "irregular actions and pronouncements" by agency officials in adjudicatory proceedings. Pet. 23. See also Pet. 18 (asserting different standard applicable to such claims). Rather, consistent with the Federal Circuit's decision in this case, those cases merely find disqualifying bias where, on the facts presented, the decisionmaker appears to have *committed himself* to a

particular final outcome such that he could not fairly adjudicate the proceeding pending before him. See *Cinderella*, 425 F.2d at 590 (speech by Chairman Dixon of the FTC, in which he announced the advertisements at issue were deceptive, "may have the effect of *entrenching* [the] Commissioner in a position, * * * making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record") (emphasis added); *Texaco*, 336 F.2d at 760 (recusal required where speech revealed that Chairman Dixon had "already concluded that Texaco and Goodrich were violating the Act, and that he *would protect the petroleum retailers* from such abuses") (emphasis added); see also *Belsinger* v. *District of Columbia*, 295 F. Supp. 159, 162 (D.D.C. 1969) (distinguishing *Texaco* as a case in which Chairman Dixon, "[h]aving taken this strong public position, * * * had an interest in seeing it sustained which might have clouded his judgment"), rev'd on other grounds, 436 F.2d 214 (D.C. Cir. 1970).

Petitioner's claim that the D.C. Circuit applies a different standard in cases like this one is further belied by the D.C. Circuit's own construction of its *Texaco* and *Cinderella* decisions. For example, in *Metropolitan Council of NAACP Branches* v. *FCC*, 46 F.3d 1154 (D.C. Cir. 1995), the court stated:

> We review an agency member's decision not to recuse himself from a proceeding under a deferential, abuse of discretion standard. * * * In an adjudicatory proceeding, recusal is required only where "a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career and Fin-*

> *ishing Schools, Inc.*, 425 F.2d at 591 (citations omitted). *In other words*, we will set aside a commission member's decision not to recuse himself from his duties *only where he has demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence.*

*Id.* at 1164-1165 (emphasis added, internal quotation marks omitted). See also *Power* v. *FLRA*, 146 F.3d 995, 1001-1002 (D.C. Cir. 1998) (applying same standard to reject disqualification claim in adjudicatory proceeding absent showing that the decisionmaker had "demonstrably made up [his] mind" and had "a fixed opinion—a closed mind on the merits of the case") (internal quotation marks omitted). Consistent with those cases and this Court's precedents, the Federal Circuit employed a similar analysis and found that the decisionmaker here, Mr. LaRussa, had not impermissibly committed himself to any particular result or position on the merits. See Pet. App. 29a-30a (decisionmaker's ability to change positions was not undermined or deterred by preliminary estimates); see also *Withrow*, 421 U.S. at 57 (employing similar analysis to conclude that there was an insufficient risk "that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position"); *Hortonville*, 426 U.S. at 493 (due process not violated unless complainant can show that decisionmaker was not "capable of judging a particular controversy fairly on the basis of its own circumstances").

The Tenth Circuit's decision in *Staton* and the Eighth Circuit's decision in *Antoniu* likewise offer no support for petitioner's claims. In *Staton*, 552 F.2d at 908, the

Tenth Circuit found that "firm public statements" and private discussions by three school board members specifically pledging to remove the school superintendent for cause, made prior to the hearing before the school board to decide the question, were statements that did not "leav[e] the decisionmaker capable of judging [the] controversy fairly on the basis of its own circumstances," 552 F.2d at 914 (citing *Hortonville*). Such statements were not "simply a case of the instigation of charges and a statement of them during an investigatory phase by the body that will later decide the merits of the charges." *Ibid.* (citing *Withrow*). Rather, the court held, they were "statements on the merits by those who must make factual determinations on contested fact issues of alleged incompetence and willful neglect of duty, where the fact finding is critical." *Ibid.*; see also *Skelly Oil Co.* v. *Federal Power Comm'n*, 375 F.2d 6, 18 n.14 (10th Cir. 1967) (rejecting a claim that public speeches by two FEC commissioners revealed bias against certain producers in pending gas rate proceedings, distinguishing *Texaco* and similar cases as ones in which "the charge was precommitment of a commissioner on the guilt of an accused"), aff'd *sub nom. Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

*Antoniu*, 877 F.2d at 721, likewise involved public statements that might impermissibly wed the decisionmaker to a particular outcome. There, a Commissioner of the Securities and Exchange Commission made a speech announcing that Mr. Antoniu had been permanently barred from employment in the securities industry due to criminal misconduct, and labeling Mr. Antoniu an "indifferent violator" of the securities laws; in fact, however, the question of whether to impose the sanction of permanent debarment was pending before

the Commission for decision. 877 F.2d at 724. After quoting the above language from the Tenth Circuit's decision in *Staton*, see *ibid.* (quoting *Staton*, 552 F.2d at 914-915), the Eighth Circuit concluded that the Commissioner's "words describing Antoniu's bar as permanent" and Antoniu himself as an "indifferent violator" can "only be interpreted as a prejudgment of the issue" amounting to a "public denouncement of him" in advance of full consideration on the merits. *Id.* at 723. Like the statements at issue in *Cinderella* and *Texaco*, such categorical statements on the part of a decisionmaker in advance of full consideration on the merits committed the commissioner to a particular outcome and required his recusal. *Id.* at at 724-726. In contrast, in cases where the decisionmaker's statements would not have the effect of unduly entrenching his position on a particular issue, the Tenth Circuit has declined to find an impermissible bias. See, *e.g.*, *Welch* v. *Barham*, 635 F.2d 1322, 1327 (8th Cir. 1980) (the prior involvement of board members in the investigation and framing of the charges against the superintendent, and the statements of two board members in response to hypothetical questions (asking them to speculate about what kind of evidence from the superintendent, had he chosen to present any at the hearing, might have altered their decision) were "insufficient as a matter of law to demonstrate irrevocable prejudgment"), cert. denied, 451 U.S. 971 (1981).

Finally, in *American Cyanamid*, 363 F.2d at 757, the Sixth Circuit held that FTC Chairman Dixon should have recused himself from deciding a matter concerning drug industry price and marketing collusion pending before the Commission, where he had participated as counsel in a congressional investigation of those very same issues, in light of "the depth of the investigation

and the questions and comments by Mr. Dixon as counsel." *Id.* at 768. That case, the court of appeals noted, is analogous to judicial recusal where the judge previously represented one of the parties or participated personally and substantially in the matter before his or her appointment. *Ibid.*

c. No similar claims of bias or pre-judgment can be made here. Unlike the case of *American Cyanamid*, this case involves no claim that the decisionmaker, Mr. LaRussa, ever worked as counsel for one of the parties or as an advocate on this issue prior to becoming a decisionmaker at Commerce. And, unlike *Cinderella*, *Texaco*, *Staton*, and *Antoniu*, there is no basis for any claim that the decisionmaker in this case, Mr. LaRussa, made any statement that might have committed him to a particular result. To the contrary, petitioner can point to no statement by Mr. LaRussa at all. See Pet. App. 27a ("[T]he final decision maker in this case—Mr. LaRussa—was to a large extent insulated from the earlier" events of which petitioner complains); *id.* at 30a-31a (noting that a different decisionmaker, Mr. LaRussa, "interven[ed]" after the events cited by petitioner took place); *id.* at 68a (petitioner faces an "added burden * * * because a new decisionmaker replaced the Assistant Secretary under whose command the predecisional analysis and letter were prepared and disseminated").

Instead, petitioner is reduced to pointing to the actions and statements of other officials at Commerce. See Pet. App. 28a-29a. But bias in a decisionmaker cannot be established merely by alleging bias or prejudgment by *other* agency officials or staff. See *Cinderella*, 425 F.2d at 586 ("a distinction must be drawn between" agency staff or an agency as a whole, and the official(s) responsible for rendering particular types of decisions

on the merits); *id.* at 590 ("[t]here is a marked difference between" an agency's statement that it has "reason to believe" that a violation has occurred, "and statements by a [decisionmaker while the matter is pending before him] which give the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves.") (internal quotation omitted); see also Pet. App. 30a, 68a (noting substitution of Mr. LaRussa as decisionmaker as a significant factor).

Besides, as both courts below expressly found, even the statements of the Commerce officials upon which petitioner relies are insufficient to show bias, and did not have the final or conclusory quality that might commit Commerce to a particular result. Contrary to petitioner's repeated, wholly unsupported assertions (see Pet. 4-5), Commerce officials did not pronounce NEC "guilty" of dumping until the conclusion of the antidumping proceeding (in which NEC was invited, but refused, to participate). Instead, as both the trial court and court of appeals found, all of the earlier statements that NEC points to as evidence of prejudgment "were qualified" as "constructive," "preliminary," "estimated"; were expressly "based on the preliminary analysis as understood to date"; and all were made without benefit of, and subject to change in light of, NEC's input. Pet. App. 28a-30a. Indeed, there was nothing in Commerce's documents or conduct indicating that it and its staff "would not reconsider" the preliminary estimates "once they were presented with actual data." *Id.* at 29a. This is a far cry from the sort of "firm statements" and pre-commitment to a particular outcome that the courts faulted in the cases that petitioner cites. *Ibid.* ("The statements made by Commerce officials * * * were not of a nature or made in

such context as 'to raise a sufficiently grave possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.'") (quoting *Withrow*, 421 U.S. at 57).

4. Finally, further review would be inappropriate because this case does not present an adequate vehicle for addressing petitioner's primary claim—that a different and less demanding test for impermissible pre-judgment in an adjudicatory proceeding applies where the decisionmaker's conduct is "irregular" and falls outside its authorized statutory and regulatory role. See Pet. 15, 18. Here, no irregular or extra-statutory conduct took place. It is hardly irregular for an agency having specific authority and special expertise in a difficult area such as the antidumping laws to provide assistance and advice to a sister federal agency lacking such experience when it confronts such issues.

Indeed, as the Court of International Trade noted (Pet. App. 68a n.97), Commerce is specifically authorized by statute to inquire into particular imports at any time to determine whether to self-initiate an antidumping investigation. See 19 U.S.C. 1673a(a). Inherent in the antidumping laws is a legislative directive to take steps to protect domestic industries from "material injury" caused by below-fair-value pricing of imported goods. By looking into the imports at issue here and sharing relevant information with NSF, whose supervision over the expenditure of substantial federal funds in the UCAR procurement was directly affected by any potential dumping, Commerce acted well within its statutory and regulatory role in enforcing the antidumping laws. Indeed, there is a "general presumption that information obtained by one Federal Government

agency is to be freely shared among Federal Government agencies." Pet. App. 68a-69a n. 97 (quoting *Inter-Departmental Disclosure of Information Submitted Under The Shipping Act of 1984*, 9 Op. OLC 48, 53 (Feb. 8, 1985)). Likewise, it is not "irregular" for agency officials to respond to oversight inquiries from Congress or superior Executive Branch officials. Indeed, refusal to respond to those inquiries could result in a citation for contempt.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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